

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 STEVEN J. BELL,)
11 Plaintiff,) Case No. 2:09-cv-00150-RSL
12 vs.)
13 FEDERAL DEPOSIT INSURANCE) DEFENDANT TWIN CAPITAL
14 CORPORATION; TWIN CAPITAL) MORTGAGE'S PARTIAL MOTION
15 MORTGAGE, INC.; MORTGAGE) TO DISMISS PURSUANT TO
16 ELECTRONIC REGISTRATION SYSTEMS,) FED. R. CIV. P. 12(b)(6)
17 INC.; REGIONAL TRUSTEE SERVICES)
18 CORPORATION; LENDER PROCESSING) NOTED ON MOTION CALENDAR:
SERVICES, INC.; and DOE DEFENDANTS) Friday, October 30, 2009
1 through 20, inclusive,)
Defendants.) (ORAL ARGUMENT REQUESTED)

I. MOTION

21 Pursuant to Fed. R. Civ. P. 12(b)(6), defendant Twin Capital Mortgage, Inc.
22 ("Twin Capital"), moves this Court to dismiss the state law claim of intentional infliction
23 of emotional distress asserted by plaintiff Steven J. Bell ("Bell" or "Plaintiff") against
24 Twin Capital in the above-entitled matter. Plaintiff's common law tort claim for intentional
25 infliction of emotional distress or outrage, as averred in Plaintiff's Complaint, fails to state
26 a claim upon which relief can be granted. Accordingly, Twin Capital respectfully requests

**PAGE 1 - DEFENDANT TWIN CAPITAL MORTGAGE'S
PARTIAL MOTION TO DISMISS**

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1 that this claim be dismissed as a matter of law and that any claim for emotional damages,
 2 as pled against Twin Capital, be stricken from the Complaint.

3 II. PROCEDURAL BACKGROUND

4 On or about December 28, 2008, Plaintiff commenced an action in King County
 5 Superior Court for the State of Washington, Case No. 08-2-43441-9 SEA, alleging various
 6 claims for relief against numerous defendants, including Twin Capital. Docket No. 1.
 7 On February 3, 2009, a Notice of Removal was filed on the basis of federal question
 8 jurisdiction, thus removing the state court action to the present forum. Docket No. 1. The
 9 underlying Complaint contains six separate causes of action, the second of which asserts
 10 a tort claim for intentional infliction of emotional distress against all of the then-captioned
 11 defendants.¹ The Second Cause of Action, as pled against Twin Capital, is the subject of
 12 the present Motion.

13 III. POINTS AND AUTHORITIES

14 A. Plaintiff's Allegations Against Twin Capital.

15 In addition to the outrage claim, Plaintiff asserts a cause of action against
 16 Twin Capital for alleged violations of the Consumer Protection Act and Mortgage
 17 Broker Practices Act, RCW 19.146.030. Docket No. 1; Complaint, ¶¶ 3.14-3.15. Of the
 18 allegations that pertain to Twin Capital, most, if not all, address this latter claim for relief.
 19 Plaintiff alleges that Twin Capital engaged in the following conduct:

20 [D]efendant Twin Capital sent Mr. Bell a mail solicitation and he responded
 21 by calling. All communications with Defendant Twin Capital were handled by
 22 telephone. He decided to make application with Defendant Twin Capital
 23 because they quoted him a much lower rate. The representative of
 24 Defendant Twin Capital told Mr. Bell that they had a "special" loan product
 25 that no one else could offer because it had "Chinese investors" who were
 26 willing to lend at lower rates. Mr. Bell communicated with an individual

25 ¹ On May 5, 2009, an Order was entered substituting Lender Processing Services, Inc., in
 26 the place of defendant Fidelity National Title Company. Docket No. 25. The Federal Deposit
 Insurance Corporation was substituted as Receiver for IndyMac Bank, F.S.B., on August 19, 2009.
 Docket No. 32.

1 named Jerome at Defendant Twin Capital, and he was told that the simple
2 interest rate was 2.15% and that it would end up being 2.9% APR after the
3 costs were built into the loan. Mr. Bell . . . was reassured of its legitimacy by
4 Jerome, who kept talking about the Chinese investors. Jerome said that the
investors were not making any money from interest in China and so were
willing to lend at significantly reduced rates in the U.S. because it was still
better than the rates they were getting in China.

5 Complaint, ¶ 2.2.

6 Mr. Bell . . . received a Good Faith Estimate ("GFE") from [Twin Capital] for
each of the two proposed loans which he signed on June 20, 2006. . . . Mr.
7 Bell contends that the various fees added to his loan costs by Defendant
Twin Capital are nothing more than junk fees . . . The GFE did NOT indicate
8 whether the new lender was proposing to charge Mr. Bell a prepayment
penalty and the proposed interest rate is listed as 2.15% for a period of 40
9 years on an initial variable rate. Mr. Bell now knows that this information was
10 absolutely untruthful as his loan did not carry an interest rate of 2.15%. The
GFE did not indicate that Defendant Twin Capital was going to be paid a
Yield Spread Premium . . .

11 Complaint, ¶ 2.3.

12 The GFE for the second mortgage loan indicated that Defendant Twin Capital
was going to receive \$675.00 as a processing fee, \$299.00 for "doc prep"
13 and \$565.00 as a (sic) "admin" charge. Mr. Bell maintains that these fees
were also just junk fees . . . This GFE indicates that the second mortgage
14 loan would have an interest rate of 4.99% . . . Further, because he was
persuaded by Defendant Twin Capital that this loan was at such a low
15 interest rate Mr. Bell was induced to enter into these loans, and as a result,
paid a pre-payment penalty to his previous mortgage lender of \$8,972.40.

16 Complaint, ¶ 2.4.

17 Mr. Bell was thereafter advised that a freelance notary would come to
his home so that he could sign the loan documents in early July 2006. . . .
18 Mr. Bell maintains that [the] choice of escrow agent, Defendant First
American, by Defendant Twin Capital and the decision to send a freelance
notary to handle the signing, was nothing more than an effort to make certain
20 that he did not receive accurate information about the loan terms before
he signed.

21 Complaint, ¶ 2.5.

22 [D]uring the signing process, [Mr. Bell] did note that it appeared the interest
rate was different than was represented to him by Jerome. Mr. Bell called
23 Jerome during the signing process . . . but he was again assured by Jerome
that the rate really was 2.15%. Jerome said that the interest rate on the loan
25

1 documents looked like it was higher because it included all of the closing
 2 costs in the calculation of the first year's rate.
 3

4 Complaint, ¶ 2.6.
 5

6 Plaintiff makes no further specific allegations against Twin Capital that state facts
 7 which pertain to an alleged commission of the tort of outrage. Under his Second Cause of
 8 Action, Plaintiff merely "incorporates herein by reference, as though fully set forth at length,
 9 each and every allegation and statement contained in [the Complaint]." Complaint, ¶ 3.5.
 10 He concludes by alleging that, "[b]y their conduct described in this Complaint, all of the
 11 Defendants have committed the tort of intentional infliction of emotional distress."
 12 Complaint, ¶ 3.6.

13 **B. Legal Standards.**

14 **1. Standards for Fed. R. Civ. P. 12(b)(6) Motion.**

15 In considering a Rule 12(b)(6) motion, the Court may dismiss a claim if it appears
 16 beyond a doubt that Plaintiff can prove no set of facts to support the claim that would entitle
 17 the Plaintiff to relief. *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983)
 18 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Dismissal may be based on either
 19 the lack of a cognizable legal theory or the absence of sufficient facts alleged under a
 20 cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.
 21 1990). Material allegations are taken as admitted and the complaint is construed in the
 22 plaintiff's favor. *Keniston*, 717 F.2d at 1300. However, "[c]onclusory allegations of law
 23 and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to
 24 state a claim." *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir.
 25 2001). A plaintiff must plead factual allegations with specificity; vague allegations of fact
 26 fail to state a claim for relief. See *Colburn v. Upper Darby Township*, 838 F.2d 663, 666
 (3rd Cir. 1988).

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1 **2. Elements of State Law Claim of Outrage.**

2 In Washington, outrage and intentional infliction of emotional distress claims
 3 are treated as one and the same. *Snyder v. Medical Serv. Corp. of Eastern Wash.*,
 4 98 Wn. App. 315, 321, 988 P.2d 1023 (1999). The tort of outrage requires the proof of
 5 three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction
 6 of emotional distress, and (3) actual result to plaintiff of severe emotional distress. *Reid v.*
 7 *Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (citing *Dicomes v. State*,
 8 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (quotation omitted)). These elements were
 9 adopted from the Restatement (Second) of Torts § 46 (1965) by the Supreme Court of
 10 Washington in *Grimsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975).

11 In *Grimsby*, the court held that any outrage claim must be predicated on behavior
 12 "so outrageous in character, and so extreme in degree, as to go beyond all possible
 13 bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized
 14 community." *Id.* at 59 (quoting Restatement (Second) of Torts § 46 cmt. d). Consequently,
 15 the tort of outrage "does not extend to mere insults, indignities, threats, annoyances,
 16 petty oppressions, or other trivialities.' In this area plaintiffs must necessarily be hardened
 17 to a certain degree of rough language, unkindness and lack of consideration." *Id.* The
 18 Court may dismiss a claim if reasonable minds could not differ as to the conclusion that the
 19 alleged behavior was not sufficiently extreme. *Minvielle v. Smile Seattle Invs., L.L.C.*,
 20 2008 U.S. Dist. LEXIS 96848, at *15 (W.D. Wash. Nov. 19, 2008) (citation omitted).

21 **C. Plaintiff Fails to State a Claim of Outrage.**

22 **1. Allegations Fail to Satisfy Intent Element.**

23 Again, to state a claim for the tort of outrage, a claimant must allege (1) extreme and
 24 outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual
 25 result to the plaintiff of severe emotional distress. *Reid*, 136 Wn.2d at 202. Plaintiff's
 26 allegations regarding Twin Capital's actions are completely silent as to the element of

1 intent, nor do they speak as to whether Twin Capital should have been aware that the
 2 alleged conduct could inflict emotional distress. The part of the Complaint addressing the
 3 outrage claim merely incorporates by reference all of the other assertions about the
 4 defendants' conduct that Plaintiff had made earlier in the Complaint. Even if Twin Capital
 5 actually committed the acts that Plaintiff alleges, he does not assert any facts showing that
 6 Twin Capital acted intentionally to cause him severe emotional distress. Nor do the
 7 pleadings indicate that Twin Capital was aware that its conduct would cause severe
 8 emotional distress. Instead, the entirety of the allegations made against Twin Capital relate
 9 to Plaintiff's Fifth Cause of Action for an alleged violation of the Consumer Protection Act,
 10 not his Second Cause of Action for Intentional Infliction of Emotional Distress. Vague
 11 pleadings do not suffice, and, without more, Plaintiff fails to state a claim of outrage against
 12 Twin Capital, thus justifying a dismissal with prejudice.

13 Similarly, Plaintiff fails to allege a set of facts that, if accepted as true, would lead
 14 reasonable minds to the conclusion that Twin Capital engaged in outrageous or extreme
 15 behavior. Based on the relevant pleadings here, the opposite inference is to be drawn,
 16 namely that the actions of Twin Capital in negotiating the loan and financing given to
 17 Plaintiff do not rise above the threshold of socially intolerable behavior.

18 **2. Alleged Actions Are Not Sufficiently Extreme or Outrageous.**

19 Plaintiff's entire outrage claim is based on the alleged conversations Plaintiff had
 20 with "Jerome" and the subsequent representations made to him about the terms of his loan
 21 package. Since Plaintiff does not specifically refer to which alleged actions by Twin Capital
 22 were extreme or outrageous, we are left to guess. In the Complaint, Plaintiff points out that
 23 he was told by Jerome that the loan product had a "simple interest rate [of] 2.15%, and that
 24 it would end up being 2.9% APR after the costs were built into the loan." Complaint, ¶ 2.2.
 25 Plaintiff continues, alleging that "he was reassured of [the loan's] legitimacy by Jerome,
 26 who kept talking about the Chinese investors." *Id.*

1 There is nothing inherently outrageous or extreme about these alleged
 2 statements made to Plaintiff by Jerome, nor does Plaintiff allege with specificity why these
 3 conversations are so outrageous as to go beyond all possible bounds of decency.²
 4 Plaintiff must therefore be claiming that such remarks by Jerome were outrageous
 5 because they were untrue. However, Plaintiff admits in his Complaint that he not only
 6 signed the loan documents on June 20, 2006, but that he also made monthly payments on
 7 the loans for 2006 *and* 2007. *Id.*, ¶¶ 2.3, 2.8. This leads reasonable minds to conclude
 8 that Plaintiff accepted the terms and the proceeds of the loan voluntarily, and that he was
 9 not dissatisfied with the loan until after he had lost his job and was unable to make the
 10 monthly payments. *Id.*, ¶ 2.8. Even accepting the allegation that Jerome lied to Plaintiff,
 11 such behavior cannot be regarded as “atrocious,” for Plaintiff still intended on receiving
 12 the funds from the first and second mortgage loans. When viewed in the context of
 13 Plaintiff’s express acceptance of the terms of the loans and his payments on the loans for
 14 2006 and 2007, Jerome’s alleged role here is of minor significance. Accordingly, such
 15 trivial behavior cannot form the basis for an outrage claim and this claim for relief should
 16 be dismissed as a matter of law.

17 IV. CONCLUSION

18 For the foregoing reasons, defendant Twin Capital Mortgage, Inc., respectfully
 19 requests that this Court grant its Partial Motion to Dismiss the intentional
 20 infliction of emotional distress claim filed by Plaintiff pursuant to Fed. R. Civ. P. 12(b)(6)

21

22 ² Plaintiff also alleges in his Complaint that Twin Capital collected “junk fees” and decided
 23 to send a freelance notary to the signing of the loan documents, but he does not specifically aver
 24 how such behavior constitutes extreme conduct or that Twin Capital intended to inflict
 25 severe emotional distress by engaging in this behavior. *Id.*, ¶¶ 2.3-2.6. Therefore, due to the
 lack of specificity of these allegations and their failure to establish that such conduct could be
 interpreted as extreme in character, they should not be permitted to form the basis of Plaintiff’s
 outrage claim.

26

1 and enter an Order dismissing this claim against defendant Twin Capital, with prejudice,
2 thereby dismissing any claim by Plaintiff for emotional damages against defendant
3 Twin Capital.

4 DATED this 13th day of October, 2009.
5

6 **AMBROSE LAW GROUP LLC**

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**PAGE 8 - DEFENDANT TWIN CAPITAL MORTGAGE'S
PARTIAL MOTION TO DISMISS**

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2009, I electronically filed the foregoing **DEFENDANT TWIN CAPITAL MORTGAGE'S PARTIAL MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)** with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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Dated this 13th day of October, 2009.

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